UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KALIKA BHAGWAT, Plaintiff, -against- QUEENS CARPET MALL, INC. and JAANKIE TULSIE, Defendants.	**REPORT AND RECOMMENDATION** 14-cv-5474 (ENV)(PK)

Peggy Kuo, United States Magistrate Judge:

On September 18, 2014, Plaintiff Kalika Bhagwat ("Bhagwat" or "Plaintiff") filed a "Collective Action Complaint" against Queens Carpet Mall, Inc. ("Queens Carpet") and Jaankie Tulsie ("Tulsie") (together with Queens Carpet, "Defendants") under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.,* the New York Labor Law ("NYLL") §§ 190 *et seq.* and §§ 650 *et seq.,* and 12 N.Y.C.R.R. § 142. (*See* Compl. ¶¶ 1, 5, 8, Dkt. 1.) On referral from the Honorable Eric N. Vitaliano is a motion for default judgment filed on June 9, 2016 (the "Motion") by Plaintiff and Naresh Persaud ("Persaud"), a purported opt-in plaintiff. (*See* Motion for Default Judgment, Dkt. 15; Referral Order dated Aug. 23, 2016.) For the reasons explained herein, the undersigned respectfully recommends that the Motion be denied without prejudice.

BACKGROUND

The Complaint alleges that Bhagwat worked for Defendants "as a non-exempt carpet installer" between 2004 and 2014. (*Id.* ¶ 4.) Bhagwat alleges that Defendants failed to pay him "and others similarly situated for some of their hours worked in excess of forty (40) hours per work week at a time and a half rate of pay in direct violation of the FLSA and applicable state laws of the State of New York." (*Id.* ¶ 2.) Plaintiff purports to bring this FLSA collective action under 29

U.S.C. § 216(b) on behalf of "himself and all others similarly situated." (*Id.* ¶ 18.)

On September 22, 2014, shortly after the Complaint was filed, Plaintiff's counsel filed Consent to Join forms signed by Bhagwat and Persaud. These forms were signed on August 5, 2014, pre-dating the filing of the Complaint by several weeks. (*See* Dkt. 6, 6-1, 7, 7-1.) There was no request to certify an FLSA collective action. There was no indication that Persaud's Consent to Join was sent to Defendants.

On November 3, 2014, Plaintiff's counsel requested that the Clerk of the Court enter a Certificate of Default against the Defendants. (*See* Request for Certificate of Default, Dkt. 8.) The Request for Certificate of Default, accompanying affirmation of Plaintiff's attorney, and proposed Certificate of Default all list Bhagwat as the sole Plaintiff, *not* on behalf of others similarly situated. (*See id.*; Affirmation in Support of Request for Certificate of Default, Dkt 8-1.) There is no mention of Persaud in any of these documents.

The attorney affirmation did not assert that Defendants were served with the Complaint and summonses. (*See* Affirmation in Support of Request for Certificate of Default ¶ 3, Dkt 8-1.) However, on November 4, 2014, Plaintiff's counsel filed two affidavits of service, sworn to and signed by licensed process server Denise Lewis, both bearing a caption listing Bhagwat as the sole Plaintiff. (*See* Dkt. 9-1, 10-1.) According to the affidavits, on October 3, 2014, Ms. Lewis served the Complaint and the summonses on Queens Carpet and on Tulsie by delivering copies to an individual identified as Suneta "Doe" at 171-15 Jamaica Avenue, in Jamaica, New York 11432. (*See id.*)

On November 6, 2014, the Clerk of the Court issued a Certificate of Default against Defendants pursuant to Rule 55(a) of the Federal Rules of Civil Procedure ("Federal Rules"). (Certificate of Default, Dkt. 11.) In the case caption that appears on the Clerk's Certificate of Default, Bhagwat is listed as the sole Plaintiff. (*See id.*)

On July 8, 2015, Plaintiff's counsel filed a motion for default judgment against Defendants on behalf of both Bhagwat and Persaud ("July 8, 2015 Motion"). (*See* Dkt. 12.) The case caption continued to show only Bhagwat as the sole plaintiff. (*See id.*) This motion was supported, *inter alia*, by a "Plaintiff's Affidavit of Damages" signed by Bhagwat, and another "Plaintiff's Affidavit of Damages" signed by Persaud, both dated March 12, 2015. (*See* Bhagwat Damages Aff., Dkt. 12-5; Persaud Damages Aff., 12-6.) The Bhagwat Damages Affidavit states that Bhagwat is a Plaintiff in this action, worked for Defendants "from approximately October 2008 until approximately August 8, 2014" and is "owed a total of $53,139.20 in damages." (Bhagwat Damages Aff. §§ 2, 4 and 9.) The Persaud Damages Affidavit asserts that Persaud is an "Opt-in Plaintiff" in this action, worked for Defendants "from approximately October 16, 2008 to approximately August 5, 2014" and is "owed a total of $52,789.60 in damages." (Persaud Damages Aff. §§ 2, 4 and 9.)

On November 13, 2015, Judge Vitaliano denied the July 8, 2015 Motion without prejudice and with leave to renew. (*See* Memorandum and Order dated Nov. 13, 2015, Dkt. 13.) Judge Vitaliano found numerous procedural deficiencies, including that movants failed to include "a copy of the claim upon which they seek default, a memorandum of law, proof of mailing that this motion was served upon defaultees' last known mailing address, and a certification that the individual defendant is not a servicemember." (*Id.* at 2.) He stated that "[t]he fact that some of these items may be found electronically, scattered on the docket, does not absolve movants of the obligation to collect and append copies of the moving papers." (*Id.* (citing cases).) Judge Vitaliano advised that "this Order may not be an exhaustive recitation of the deficiencies in the moving papers" and cautioned movants "to re-examine all of the rules applicable to default judgment motions and to comply strictly with each of them." (*Id.* at 2-3 (emphasis in original).)[1]

[1] Judge Vitaliano also noted that the Affirmation in Support of the Motion for Default Judgment erroneously transcribed the number of hours Bhagwat and Persaud were alleging that they worked per week. (*See* Memorandum and Order dated Nov. 13, 2015 at 2 n.2, Dkt. 13.)

Nearly seven months later, on June 9, 2016, Plaintiff's counsel filed a renewed motion for default judgment (the "Motion"), which purports to be on behalf of Bhagwat and Persaud, but with a caption that again lists Bhagwat as the sole plaintiff. (*See* Dkt. 15.) Attached to the Motion are the following thirteen documents:

(i) an Affirmation of Plaintiff's attorney Jodi Jaffe in Support of Motion for Default Judgment and Memorandum of Law (Dkt. 15-1);

(ii) an Attorneys' Fees and Costs Affidavit that purports to be sworn to Ms. Jaffe, before a notary, but is not notarized by anyone and is electronically signed by Ms. Jaffe (Dkt. 15-2);

(iii) a proposed "Order on Plaintiffs' Motion for Final Default" (Dkt. 15-3);

(iv) a copy of the Complaint (Dkt. 15-4);

(v) a Notice of Filing Proof of Service dated November 4, 2014, with a Certificate of Service by Ms. Jaffe (Dkt. 15-5);

(vi) a *duplicate* Notice of Filing Proof of Service dated November 4, 2014, with a Certificate of Service by Ms. Jaffe (Dkt. 15-6);

(vii) the Affidavit of Service dated October 6, 2014 related to service on Tulsie (Dkt. 15-7);

(viii) the Clerk of the Court's Certificate of Default entered by November 6, 2014 (Dkt. 15-8);

(ix) an Affidavit in Compliance with Servicemembers Civil Relief Act dated June 9, 2016 (Dkt. 15-9);

(x) the Persaud Damages Affidavit dated March 12, 2015 (Dkt. 15-10);

(xi) the Bhagwat Damages Affidavit dated March 12, 2015 (Dkt. 15-11);

(xii) partially redacted billing records by Plaintiff's counsel's firm (Dkt. 15-12); and

(xiii) costs information from Plaintiff's counsel's firm (Dkt. 15-13).

The Affidavit of Service on Queens Carpet, which was previously filed at Dkt. 9-1, was not attached to the Motion. (*See* Dkt. 9-1.) In addition, no proof was offered that the Motion and its accompanying papers were mailed to Queens Carpet at its last known business address or Jaankie

Tulsie at that defendant's last known residence.

On June 16, 2016, Plaintiff's counsel filed "Plaintiff's Notice of Filing Proof of Service," which states, in its entirety, "Plaintiff Kalika Bhagwat, through undersigned counsel, hereby notifies the Clerk of Court of the filing of Proof of Services as to all Defendants." On the next page is a Certificate of Service signed by Andrew Glenn, Esq. and attached are two U.S. Postal Service Certified Mail Receipts ("Mail Receipts"). (*See* Dkt. 16, 16-1, 16-2.) Mr. Glenn certifies that on June 16, 2016, he "electronically filed the foregoing document with the Clerk of Court" using CM/ECF and that the "foregoing document is being served on this day on all counsel of record identified on the attached Service List in the manner specified." (Dkt. 16.) The only "foregoing document" is the "Notice of Filing Proof of Service." The "Service List" does not include any "counsel of record," instead listing the Defendants themselves. There is no manner specified.

On August 23, 2016, Judge Vitaliano referred the Motion to the undersigned "for an assessment of liability, an inquest as to damages, and to make a report and recommendation as to her findings." (Referral Order dated Aug. 23, 2016.)

DISCUSSION

I. Default Judgment Standard

Default judgments are "disfavored and are reserved for rare occasions," even as their disposition is left to the sound discretion of the district court. *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95-96 (2d Cir. 1993). After the entry of default, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." *Trs. of the Plumbers Local Union No. 1 Welfare Fund v. Philip Gen. Constr.*, No. 05-cv-1665 (NG)(RLM), 2007 WL 3124612, at *3 (E.D.N.Y. Oct. 23, 2007). While Federal Rule of Civil Procedure 55(a) requires entry of a certificate of default as a clerical matter, liability is not a sure thing and still requires judicial consideration. An entry of default by the Clerk of Court is sometimes insufficient to establish liability. *Onewest Bank, N.A. v. Cole*, No. 14-cv-3078 (FB) (RER), 2015 WL 4429014, at *4 (E.D.N.Y. July 17, 2015); *see also BH99 Realty, LLC v. Li*, No. 10-cv-0693 (FB)(JO), 2011 WL 1841530, at *3 (E.D.N.Y. Mar. 16, 2011), R&R adopted, 2011 WL 1838568 (E.D.N.Y. May 13, 2011) ("The fact that a complaint stands unanswered does not . . . suffice to establish liability on its claims . . . .").

Further, "default judgment can only be contemplated if the court has jurisdiction over the defendant and the defendant has been served with process properly." *First Tennessee Bank Nat. Ass'n v. Thause*, No. 10-cv-2219 (NGG) (ALC), 2011 WL 4543869, at *2 (E.D.N.Y. Sept. 28, 2011) (citing, *inter alia*, *De Santis v. City of New York*, No. 10-cv-3508 (NRB), 2011 WL 4005331, at *6 (S.D.N.Y. Aug. 29, 2011)).

II. Non-Compliance With Local Civil Rule 55.2(c)

At the outset, the undersigned finds that Plaintiff's counsel has again failed to comply with the requirements of Local Civil Rule 55.2(c) notwithstanding Judge Vitaliano's exhortation to "re-examine all of the rules applicable to default judgment motions and to comply strictly with each of them." (*See* Memorandum and Order dated Nov. 13, 2015 at 2, Dkt. 13 (emphasis in original); Local Civ. R. 55.2(c)).

Local Civil Rule 55.2(c) requires that all papers submitted to the Court pursuant to a motion for default judgment

> shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court.

Local Civ. R. 55.2(c). Plaintiff's counsel has not filed anything that constitutes proof of such mailing.

First, the Certificate of Service that accompanies the Motion states only that on June 9, 2016, Plaintiff's counsel "electronically filed the foregoing document with the Clerk of Court using CM/ECF" and that

> the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Filing.

(*See* Dkt. 15.) There is no attached "Service List," no counsel identified, and no specified manner of service. There is no indication, let alone proof, that the Motion and accompanying papers were mailed to Defendants simultaneously with the Motion's filing.

The documents filed on June 16, 2016 also do not support Plaintiff's compliance with Local Civil Rule 55.2(c). (*See* Dkt. 16, 16-1, 16-2.) The Certificate of Service certifies that the "foregoing document is being served on this day on all counsel of record identified on the attached Service List in the manner specified." The only "foregoing document" is the Notice of Filing Proof of Service itself. (*See* Dkt. 16.) There are no counsel identified, there is no manner specified, and importantly, there is no indication that the Motion papers were mailed to the Defendants at the appropriate addresses. One of the Mail Receipts shows a mailing on June 15, 2016 addressed to "Jaankie Tulise" [sic] at 10161 Lefferts Boulevard, Richmond Hill, New York 11419, while the other shows a mailing on June 10, 2016 addressed to "Jaankie Tulise" [sic] at 171-15 Jamaica Avenue, Jamaica, New York 11432.[2] (*See* Dkt. 16-1, 16-2.) There is no assertion that the addresses used were the "last known residence" of Jaankie Tulsie or the "last known business address" of Queens Carpet Mall, Inc. *See* Local Civ. R. 55.2(c). In addition, there is no indication that anything was mailed to Queens Carpet as a corporate defendant, as opposed to two mailings to "Jaankie Tulise" [sic] at two different addresses. (*See* Dkt. 16-2.) Putting aside all the errors with the addresses and addressees, there is no

[2] The "Service List" gives an inconsistent address of "117-13 Jamaica Avenue, Jamaica New York 11432." (*See id.*)

indication of *what* was actually mailed. Therefore, no proof was filed that the Motion and accompanying papers were mailed, as required by Local Civil Rule 55.2(c).

On the basis of these deficiencies alone, the undersigned respectfully recommends that the Motion be denied. *See Jara v. P.N. Financial, Inc.*, No. 10-cv-6274 (PAE) (HBP), 2012 WL 5290349, at *1 (S.D.N.Y. Oct. 26, 2012).

III. Persaud's Motion for Default Judgment as Putative FLSA Opt-In Plaintiff

There is another, separate basis for denying the Motion as to Persaud, who has moved for default judgment in reliance on his status as an "opt-in Plaintiff." The Complaint is styled as a "Collective Action Complaint" and Persaud has signed a Consent to Join form. However, Persaud is not named in the Complaint, and there has been no motion for collective action certification under § 216(b) of the FLSA, or class action certification under Rule 23 of the Federal Rules. The Complaint was filed *after* the Consent to Join forms had already been signed by both Bhagwat and Persaud. (*See* Compl., Dkt. 1; Dkt. 6-1, 7-1.) In addition, despite opportunities to amend the Complaint under Rules 15(a)(1)(A) and 15(a)(2) of the Federal Rules, no leave was ever requested to add Persaud's claims. There is not even evidence that the Consent to Join form signed by Persaud was ever served on Defendants to put them on notice of his claims.

In FLSA cases, "[c]ourts have expressed concern about whether opt-in plaintiffs are entitled to default judgment based on a complaint in which they are not named, but wherein the intent to proceed as a collective action is clear." *Charvac v. M & T Project Managers of New York, Inc.*, No. 12-cv-5637 (CBA) (RER), 2013 WL 6711485, at *3 (E.D.N.Y. Dec. 18, 2013) (citation omitted); *see also Noboa v. Toron Restoration Corp.*, No. 14-cv-730 (ARR) (CLP), 2015 WL 1672815, at *4-5 (E.D.N.Y. Mar. 26, 2015). Without service of an amended pleading that incorporates the opt-in plaintiffs' claims, there is "no legal basis upon which to award damages, attorney's fees, and costs to the opt-in plaintiffs." *See Charvac*, 2013 WL 6711485, at *3 (citing *Hosking v. New World Mortg., Inc.*, No. 07-cv–

2200 (MKB) (ARL), 2013 WL 5132983, at *6–7 (E.D.N.Y. Sept. 12, 2013).

In circumstances such as this, "courts have required the plaintiff to amend the complaint to include those individuals who have consented to join the action and to serve the amended complaint upon the defendant." *Id.* (citing *Rodriguez v. Almighty Cleaning, Inc.*, 784 F.Supp.2d 114, 133 (E.D.N.Y. 2011) and *Cortes v. Astoria N.Y. Holdings LLC*, No. 1 l–cv–3062, 2011 WL 5964598, at *3 n.5 (E.D.N.Y. Oct. 24, 2011)).

Accordingly, the undersigned recommends that the Motion be denied as to Persaud, without prejudice. Should Plaintiff wish to amend the Complaint to add Persaud as a named plaintiff, the undersigned respectfully recommends that Plaintiff be permitted to file a proposed amended complaint setting forth sufficient facts and details regarding Persaud's claims. That amended complaint should then be served on Defendants so they have an opportunity to respond. If, at that time, Defendants do not respond, an entry of default may be requested, and, once granted, the Court could then consider a motion for default judgment on the amended complaint. *See Noboa* at 2015 WL 1672815, at *5.

IV. Bhagwat's Motion for Default Judgment

With regard to Plaintiff Bhagwat's claims, which were set forth in the Complaint, the undersigned also respectfully recommends that the Motion be denied. When courts have denied motions for default judgment by FLSA opt-in plaintiffs without prejudice and allowed for amendment of the complaint, those courts have also deferred granting default judgment to the original plaintiff until after the opt-in plaintiffs are formally joined and the defendants have been duly served with the amended complaint. *See Noboa*, 2015 WL 1672815, at *5; *Charvac*, 2013 WL 6711485, at *3; *cf. Hosking*, 2013 WL 5132983, at *7. These cases follow the reasoning that "it is unclear whether the Court could continue to adjudicate the FLSA collective action after granting Plaintiff default judgment [because] [a]n entry of default judgment is a form of final relief that may trigger the mootness doctrine and bar plaintiff from continuing as the class representative in the FLSA collective action." *See Troncone v. Velahos*, No. 10-cv-2961 (RBK) (AMD), 2011 WL 3236219, at *8 n.8 (D. N.J. July 28, 2011).

An entry of default judgment now in favor of Bhagwat may "trigger the mootness doctrine," which would then disqualify Bhagwat from serving as the class representative, frustrate renewal of Persaud's motion for default judgment, or preclude prosecution of the claims of other individuals who may qualify as opt-in plaintiffs. *See Noboa*, 2015 WL 1672815, at *5 (citing *Troncone*, 2011 WL 3236219, at *8 n.8).

Accordingly, the undersigned respectfully recommends denying the Motion as to Bhagwat, without prejudice, subject to the same conditions set forth above for consideration of a new motion for default judgment.

CONCLUSION

Based on the foregoing, the undersigned respectfully recommends that the Motion as to both Bhagwat and Persaud be denied without prejudice. Plaintiff may file a new motion for default judgment after filing of an amended complaint that includes Persaud as a named plaintiff and sets forth his claims, service of that amended complaint on Defendants, failure of the Defendants to respond timely, an entry of default as to that amended complaint, and full compliance with Local Civil Rules 7.1, 55.1 and 55.2.

Plaintiff is directed to mail a copy of this Report and Recommendation to Defendants by certified mail, return receipt requested.

Any written objections to this Report and Recommendation must be filed within 14 days of service of this report. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Failure to file objections within the specified time waives the right to appeal any order or judgment entered based on this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Dated: Brooklyn, New York
March 10, 2017

SO ORDERED:

Peggy Kuo
PEGGY KUO
United States Magistrate Judge